No. 839

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

v.

PLYMOUTH MANUFACTURING CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

PLYMOUTH MANUFACTURING CORP., ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment entered in this case by the United States Circuit Court of Appeals for the Seventh Circuit on December 3, 1943.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the District Court are printed at R. 405–409. The opinion of the District Court (R. 410–411) is reported in 46 F. Supp. 433. The opinion of the Circuit Court of Appeals (R. 428–435) is reported in 139 F. (2d) 178.

JURISDICTION

The judgment of the circuit court of appeals was entered December 3, 1943. A petition for rehearing was filed within due time (R. 436) but was denied by the court on January 3, 1944 (R. 437). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The defendants, a "one-man" corporation, its president who owned virtually all its stock, and its four other officers, devised and put into effect, "with the avowed intention, to avoid the impact on the business of the corporation, of the Fair Labor Standards Act" (R. 411), arrangements designed to convert the workers employed by the corporation into "partners" not entitled to the benefits of the Act. Under these arrangements, the defendants continued to control the business and the status of the workers was not changed in substance. The question presented is whether the workers were employees of the defendants within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 3. As used in this Act—
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> * * * * *
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> (d) "Employer" includes any person acting directly or indirectly in the interest

of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

* * * * *

(g) "Employ" includes to suffer or permit to work.

STATEMENT

Petitioner, Administrator of the Wage and Hour Division, United States Department of Labor, brought this suit for an injunction to enforce the Fair Labor Standards Act against the Plymouth Manufacturing Corporation, Samuel Tomlinson and Hubert Tanner, and William H. Wolfarth, Hubert Tanner, George E. Warren and Chester H. Thompson, described as co-partners, doing business as the Plymouth Manufacturing Company (R. 30). The facts, none of which are disputed, are as follows:

(1) *The management of the business.*—Prior to October 1938, when the Fair Labor Standards Act became effective, the defendant, Plymouth Manufacturing Corporation, of Plymouth, Indiana, was engaged in the business of manufacturing boxes and other containers for shipment in interstate commerce (R. 131–132). It employed from 30 to 60 or more workmen (R. 132).

Defendant Tomlinson was the president and treasurer of the corporation, and owned directly 315 and indirectly 96 of the 416 shares of stock outstanding (R. 130–133).[1] It was stipulated that he was "dominant in the direction and management of its corporate and business affairs" (R. 42).

The defendant Tanner, Tomlinson's son-in-law, was secretary and assistant treasurer of the corporation, defendant Wolfarth assistant president, defendant Warren assistant secretary and defendant Thompson plant superintendent (R. 130–133).

After the passage of the Act and shortly before its effective date, the defendants Tomlinson, Tanner, Wolfarth, Warren, and Thompson attended several meetings of the employees called by the management of the corporation (R. 234–237, 246–248, 254, 274–276). At these meetings Tomlinson asserted, "if the wage and hour law went into effect he would have to close the shop" (R. 236) and that "he could not and would not pay overtime" (R. 225, 239–240, 248). Thereupon, for the conceded purpose of escaping the impact of the Fair Labor Standards Act, the corporation (acting through Tomlinson and Tanner) on October 10, 1938, leased its real estate and equipment to Tanner, Wolfarth, Warren, and Thompson, and assigned to them all supplies and orders (R. 81–

[1] Of the five shares not owned or controlled by Tomlinson one each was owned by the other four individual defendants and the remaining share by a nephew of Tanner's (R. 130–131, 133).

85).[2] The corporation was to receive a rental of 70% of the profits realized by the lessees or their subtenants or licensees on any business conducted on the premises (R. 83), and the lessees or their subtenants were given the right to use the name Plymouth Manufacturing Company (R. 84). The corporation agreed to finance the lessees at 6% interest (R. 83–84).

Two days later the management of the corporation called a meeting of the employees and informed them that a partnership agreement had been drawn up "for their consideration" (R. 278). The employees were informed at and after the meeting that they "would have to sign it" if they "wanted to work there" (R. 267).

On October 22 articles of partnership were signed in which Tanner, Wolfarth, Warren, and Thompson were designated as senior partners, with full management authority, and the employees as junior partners (R. 85–92). The articles provided that the partnership would sublease from the four "senior partners" the land and equipment which they had leased from the corporation, assuming all their obligations. The senior partners retained the right to terminate the lease, and they alone had the right to dissolve the partnership, to admit junior partners and to terminate the partnership as to any particular junior partner. (*Ibid.*)

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[2] The lease was terminable by either party on thirty days' notice (R. 84, 99).

Profits were to be divided 70% to the corporation, 10% to the four senior partners, 10% to the junior partners and 10% as a reserve fund (R. 87, 90, 91). The employees had previously been advised by Tomlinson that they would not be "involved in any indebtedness" (R. 255).[3] On November 7, 1939 the partnership articles were amended so as to abolish the distinction between senior and junior partners "save as to drawing accounts and division of profits" (R. 93–95). The amendment vested management in a Board of Control consisting of six partners elected one every six months, but the amendment designated the four senior partners as members of the original Board with the longest tenure (*ibid.*). Tomlinson and the lessees Tanner, Wolfarth, Warren, and Thompson retained the right to cancel the lease upon which the existence of the business depended (R. 99) and thus kept the enterprise under their control. The four senior partners, in accordance with the original plan (R. 133, 151), continued to perform their executive functions in running the business (R. 137–138).

In July 1941, on the eve of a strike of the workers and when state and federal officials were threatening to collect Social Security taxes (R. 157) [4] the Board of Control executed a "Contract

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[3] One of the defendant's attorneys recommended, however, that the employees could "protect" themselves against partnership creditors by transferring their property to their wives (R. 237).

[4] See note 12, *infra*, p. 13, and *Tomlinson* v. *Smith*, 128 F. (2d) 808 (C .C. A. 7).

for Possession and Management under Mortgage" which designated Tomlinson as trustee for the benefit of creditors (R. 105–111). The creditors at the time this occurred consisted of the Plymouth Corporation, which was obligated by the original agreement to finance the business (R. 83–84), to the extent of $38,160 and a bank to the extent of $27,000, with Tomlinson surety on the total amount (R. 106). Tomlinson signed the contract on behalf of the bank, the corporation and himself (R. 111). Tomlinson as trustee was given complete power to manage the business of the firm, with all the authority of the Board of Control except the right to admit and exclude partners and to fix rates of pay (R. 108). But the agreement separately authorized him to reduce the rates of pay "if at any time there be insufficient funds available to disburse to the membership of the firm [the employees] their several drawing accounts [their wages]" (R. 110). Hubert Tanner was appointed deputy trustee to act in Tomlinson's absence (R. 327).

In the same month the lease was modified so as to require the business to pay to the Plymouth Corporation a rental of 5% of the gross sales instead of 70% of the profits (R. 98). During the first two years there had been no profits; for 1940 70% of the profits was slightly less and for 1941 slightly more than 5% of the gross sales (R. 380–381). Throughout the period the corporation provided the partnership with the necessary funds, and the affairs of the partnership were

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discussed at corporation meetings (R. 157). The corporation purchased materials for the partnership, bought machinery for the factory and built additions to the plant (R. 149, 157–160, 283, 138–139).[5]

The net result of all these maneuvers was that by the time of the trial Tomlinson was managing the business substantially in the same way as in 1938.

(2) *The status of the workers.*—After October 22, 1938, the workers were required to sign the articles of partnership as a condition of retaining their jobs (R. 250, 267–268). The workers were paid through so-called "drawing accounts," which were expressed in terms of hourly rates of pay (R. 152, 45–77), and were admittedly "substantially the same" as the wages which they previously received from the corporation (R. 295). In addition it was stipulated that except for a few minor changes the workers performed the same duties after October 24, 1938, as before (R. 43). Defendant Thompson on occasion changed the rates of pay (R. 144). In addition, he fixed the hours of work just as he had in the

[5] Throughout the greater part of the period here involved the defendant corporation filed tax returns, sworn to by defendant Tomlinson, in which the personal property in the plant (raw materials, goods, and materials in process, manufactured articles on hand) was listed as property of the corporation (R. 124–128; pltf. ex. 12A, B, C; 13A, B, C; R. 347–359). The 1940 return stated that the corporation's business was the manufacturing of boxes (pltf. ex. 13B, R. 356).

past (R. 246, 256, 259) and the workers continued to punch time clocks (R. 161). The workers were supervised in the same manner by the same officials as in the past (R. 86, 137, 138), including Tomlinson (R. 185, 223, 265).

They were also hired and fired by defendants without regard for their formal position as partners. The senior partners had authority to admit new partners to membership (R. 86). In order to obtain "partners" the company on occasion advertised for "help wanted" in the usual manner (R. 213–214).[6] Persons applying for jobs were told they had to sign the partnership agreement (R. 177, 231, 240, 259, 217, 218). Workers were discharged for stealing chickens, smoking contrary to rules, loafing or being a poor workman (R. 134–137), and even because a former employee was coming back (R. 215–216). The original partnership agreement provided that the senior partners could "terminate" the sublease and the partnership as to any member of the firm whose conduct was found to be "unworkmanlike" or "disloyal" (R. 86, 300). Subsequently these powers were vested in the Board of Control, which

[6] In seeking a stenographer, the company advertised for "help wanted," not for a partner (R. 214). The applicant was offered $12.00 a week, and required to sign an application for membership as a partner a few days after starting work (214–215). When the girl who had formerly held the job wished to come back, five months later, the new "partner" was notified that her services were no longer needed (R. 215–216).

was authorized to "sever" the relationship of a partner with the firm (R. 94, 108). In the agreement settling the strike of August 1941 the workers were given some additional protection through a provision that a partner should not be separated except by a secret vote of the partnership or by the unanimous agreement of the Board of Control and an Adjustment Committee created by the agreement (R. 116–117).

The portion of the profits originally allocated to the junior partners, 10%, was to go only to those who had worked 600 or more hours in the calendar year, with the senior partners (later the Board of Control) having complete discretion to determine the allocation (R. 88–91). After the change in the lease whereby, in lieu of 70% of the profits, 5% of the gross sales was to be paid to the Plymouth Corporation as rental before net profits were computed, the proportion of the profits allotted to the workers was of course increased (R. 77–81, 380–381).[7] During 1938 and 1939 there had been no profits (R. 381). For 1940 the participating workers (approximately 100 in number) received an average of $14.26 each and for 1941 $14.63[8]—payments which the Indiana

[7] The "Return to Work Agreement" of September 2, 1941, deprived Tanner, Wolfarth, Warren, and Thompson of their preferential rights in the distribution of profits (R. 114). The 600-hour limitation was apparently eliminated at the same time (R. 208).

[8] Computed from Schedule B of the stipulation of facts (R. 77–81). Tanner, Wolfarth, Warren, and Thompson received $339.10 each in 1940 and at least $176.35 in 1941 (*ibid.*).

Appellate Court has characterized as in the nature of a bonus. *In re Zeits,* 108 Ind. App. 617, 637–638, 31 N. E. (2d) 209, 217.

A number of employees offered to testify that they did not intend to become partners and signed the agreement only to obtain jobs (R. 184, 219, 235–236, 257, 262).[9]

The facts surrounding the strike occurring in the summer of 1941 show the nature of the relationship between the workers and the managers, including Tomlinson. The workers struck for a five cent per hour wage increase, and proposed a contract between the company, through its Board of Control, and the workers represented by a C. I. O. local (R. 42, 111–113).[10] A leader of the workers, Pierce, was told by Tomlinson that "he would bring charges against me through the committee and have me fired out of the place" (R. 169). Tomlinson also told the strikers to "go on home and get out" (R. 170) and Thompson subsequently told Pierce he was "fired" (R. 171). The strikers' committee negotiated with Tomlinson alone. One of them testified (R. 221)—

> we figured that he was the overseer of this place. It was his factory, that is the way we figured it.

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[9] This testimony was excluded by the trial court, but error was assigned to the exclusion (R. 415–417).

[10] The workers' view of their own status appears from their description of the dispute as a disagreement "between those engaged in production and those engaged in management * * * regarding their relationship" (R. 112).

Tomlinson did nothing to dispel this impression; he replied to the request for the wage increase "I won't give it, you can go home" (*ibid.*). After five weeks the strike was settled through the intervention of the Indiana State Department of Labor (R. 115–117). The settlement agreement provided that five cents per hour should be added to the "drawing account" rate but that Tomlinson, as trustee, could decline to approve the increase to the extent he deemed advisable (R. 114–115).

The District Court found on these facts that the workers were partners and not employees of the corporation, of Tomlinson, or of Tanner, Wolfarth, Warren, and Thompson. Accordingly it held that they were not subject to the Fair Labor Standards Act (R. 406–409).[11] The Circuit Court of Appeals affirmed, on the ground that the findings of the District Court that the workers were not employees of the defendants were not "clearly erroneous" (R. 429–435).

REASONS FOR GRANTING THE WRIT

Through the devices of a lease, a sublease, a pseudo-partnership and a contract for the protection of "creditors," respondents have contrived to exclude from the protection of the Fair Labor Standards Act the persons who worked in their plant. This result has been achieved although there has been no change of consequence in what

[11] Shipment in interstate commerce and violation of the statutory standards was conceded by respondents (R. 39–41).

the workers do, in how much they are paid, or in how they are supervised, on the one hand, or in the powers exercised over them by Tomlinson and his four subordinates, on the other. It is important that a decision sanctioning this means of nullifying a remedial statute be overturned.[12] The decision is contrary to the terms and purposes of the Fair Labor Standards Act, in conflict with principles repeatedly applied by this Court in enforcing other statutes, in conflict with a decision of the First Circuit Court of Appeals involving a similar scheme under the Fair Labor Standards Act (*Fleming* v. *Palmer,* 123 F. (2d) 749, certiorari denied, 316 U. S. 662), and in conflict with a decision of the Appellate Court of Indiana as to

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[12] The importance of the problem is not limited to the Fair Labor Standards Act. Respondents' plan has also resulted in litigation with the Commissioner of Internal Revenue over the application of Titles VIII and IX of the Social Security Act (R. 369–373; *Tomlinson* v. *Smith*, 128 F. (2d) 808), and with the Indiana authorities over the application of the State Unemployment Compensation Act. *In re Zeits*, 108 Ind. App. 617, 31 N. E. (2d) 209 (1941); *Thompson* v. *Travis*, 46 N. E. (2d) 598 (Ind. 1943). Indeed the form of application for membership states that applicants "realize" that they will not be entitled to protection under these statutes as well as the Fair Labor Standards Act (R. 373–375).

The Deputy Commissioner of Internal Revenue has ruled in a considered opinion (R. 369–373) that the workers are employees of Wolfarth, Tanner, Warren, and Thompson, acting as partners, for purposes of the Social Security Act, but the Seventh Circuit has refused to dismiss a suit brought by Tomlinson, as trustee, to restrain the collection of Social Security taxes. *Tomlinson* v. *Smith*, *supra.* The suit is now awaiting trial in the District Court, pending final disposition of the instant case.

the status of respondents' own plan (*In re Zeits*, 108 Ind. App. 617, 31 N. E. (2d) 209 (1941)).[13]

1. It is our position that the workers were employees within the meaning of the Fair Labor Standards Act, and that throughout the entire period in question, and certainly after the trustee contract of July 1941, Tomlinson was their employer. His control was exercised largely individually, but also through his Plymouth Corporation, the original employer, which leased the property to, provided funds, capital equipment

[13] Both courts below relied in part upon a decision of the Marshall County Circuit Court sustaining respondents' contentions with respect to the application of the Indiana Unemployment Compensation Act (R. 398–404, 407–408, 434). That action was brought by defendant Tanner and another against defendant Thompson and other partners. The decision of the Circuit Court, which was directly contrary to the prior determination of the Indiana Appellate Court in the *Zeits* case, was reversed by the Supreme Court of Indiana on the ground that the proceeding was collusive; the opinion of the Supreme Court stated "The whole proceeding seems to be a self-serving device by which the members of the so-called partnership, plaintiffs and defendants, are seeking an adjudication that they are not indebted for the tax in the absence of the taxing agency." *Thompson* v. *Travis*, 46 N. E. (2d) 598, 599.

Although the decisions of the Indiana Appellate Court and Supreme Court were called to the attention of the court below before argument (see appellant's brief below (pp. 18–19)), its original opinion failed to mention them but referred only to the Circuit Court decision. Only at the time rehearing was denied (R. 437) did the court amend its opinion to note that the Circuit Court decision had been reversed "on the ground that declaratory judgment was an improper remedy" (R. 434).

and supplies for, and received the largest portion of the income of, the operating company. During the period that Tomlinson or the corporation, or either of them, was the employer, Tanner, Wolfarth, Warren and Thompson were clearly persons "acting directly or indirectly in the interest of an employer in relation to an employee", within the meaning of the definition of employer in Section 3 (d) of the Fair Labor Standards Act. If, for any portion of the time in question, Tomlinson or the corporation were not employers, Tanner, Wolfarth, Warren and Thompson, acting together as co-partners or otherwise, were. If Tomlinson as trustee was not the employer himself, he was acting in the interest of the employer, whether it be the corporation, Tanner, Wolfarth, Warren and Thompson as "senior partners" or as dominating members of the Board of Control.

The District Court held that the workers were not employees at all but partners (R. 406–411). The Circuit Court of Appeals, in affirming, left open the possibility that the workers might have been employees of a partnership consisting mainly of themselves (R. 435), but held that they were not employees of any of the respondents. It is true that if attention be directed primarily to the form of the contracts rather than to the substance of the transactions as a whole, there may be difficulty in determining who was the employer at any particular moment. But we believe that the court below should not have been

so exacting in imposing upon the Administrator the task of determining precisely under which shell respondents had concealed the employer. If, as we think is clear, the workers were employees and not managers of a business or self-employers, all those under whom they worked and who were party to the scheme should be subjected to an injunction against violating the Fair Labor Standards Act.

2. (a) Even apart from the statutory definitions discussed below, the workers in this case were employees and not partners. It is clear from the facts set forth in the Statement that their position, insofar as control, supervision, pay, and job tenure were concerned, did not differ from those of employees or workers generally. Furthermore, as the Indiana Appellate Court has held,[14] many of the criteria of partnership were missing. The respondents, not the workers, managed the business. The workers are not parties to a contract of "mutual agency," in which each partner can act on behalf of the others; they had no right to act as principals or to bind the partnership to the slightest extent. Cf. *Karrick* v. *Hannaman,* 168 U. S. 328, 334; *Meehan* v. *Valentine,* 145 U. S. 611; *Lindley* v. *Seward,* 103 Ind. App. 600, 620, 5 N. E. (2d) 998, 1006 (1937). The small sums distributed to the employees were more in the nature of a bonus than an allocation

[14] *In re Zeits, supra,* p. 14, and *infra,* p. 22.

of profits (*in re Zeits, supra*); in any event, mere sharing in profits does not make one a partner.[15]

Many courts have held that the realities of the employment relationship are to be given effect in determining the scope of legislation for the benefit of employees, without regard for paper devices used to make the relationship look like something else.[16] These principles have been applied to

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[15] *Meehan* v. *Valentine*, 145 U. S. 611; *D. Buchanan & Son* v. *Ewell*, 148 Va. 762, 139 S. E. 483 (1927); *Seeman* v. *Eneix*, 272 Mass. 189, 172 N. E. 243 (1930); *Winters* v. *Miller*, 227 Mich. 602, 199 N. W. 642 (1924); *Bershad* v. *Roshke*, 196 N. Y. Supp. 548 (1922); *Kalb* v. *Leff*, 138 Misc. 830, 246 N. Y. Supp. 158 (1930); *Wagner* v. *Buttles*, 151 Wis. 668, 139 N. W. 425 (1913); *Canton Bridge Co.* v. *City of Eaton Rapids*, 107 Mich. 613, 65 N. W. 761 (1895); *W. F. Bleck & Co.* v. *Soeffing*, 241 Ill. App. 40 (1926); *Bond* v. *May*, 38 Ind. App. 396, 78 N. E. 260 (1906); *Breinig* v. *Sparrow*, 39 Ind. App. 455, 80 N. E. 37 (1907). See Uniform Partnership Act, Sec. 7 (4) (7 Uniform Laws Ann., 13).

[16] *Commonwealth* v. *Weinfields, Inc.*, 305 Mass. 108, 25 N. E. (2d) 198 (1940) (lessor-lessee arrangement designed to avoid State maximum hour law); *Kaus* v. *Huston*, 35 F. Supp. 327 (N. D. Iowa) (lessor-lessee device to evade Social Security Act); *Utility Coal Co.* v. *Rogez*, 170 Okla. 264, 39 P. (2d) 60 (1935) (cooperative organized to avoid State workmen's compensation law); *People* v. *Famous Infants Knitwear Corp.*, 172 Misc. 842, 18 N. Y. S. (2d) 167 (1939) (independent contractor agreement to avoid home work law); *People* v. *Beatty*, 171 Misc. 1004, 14 N. Y. S. (2d) 260 (1939), and *People* v. *Levine*, 160 Misc. 181, 288 N. Y. Supp. 476 (1936) (partnership devices to circumvent workmen's compensation law); *Scott* v. *Miller*, 260 App. Div. 428, 22 N. Y. S. (2d) 981 (1940), affirmed, 285 N. Y. 760, 34 N. E. (2d) 910 (1941) (partnership arrangement to evade the unemployment compensation law); *Rogers* v. *Danaher*, Super. Ct., Hartford Co., Conn., March 19, 1940 (joint venture to avoid unemployment compensation law); *Montello Granite Co.* v. *Industrial Comm.*, 227 Wis. 170, 278 N. W. 391 (1938) (part-

schemes to evade the Fair Labor Standards Act.[17] And this Court has frequently enunciated the same doctrine in effectuating the purpose of other statutes. *Gregory* v. *Helvering,* 293 U. S. 465; *Chicago, M. & St. P. Ry. Co.* v. *Minneapolis Civic Association,* 247 U. S. 490, 501; *Anderson* v. *Abbott,* decided March 6, 1944 (Slip Sheet, pp. 9–10). It will not permit itself "to be blinded or deceived by mere forms * * *" but will deal "with the substance of the transaction involved" (*ibid.*).) See *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123,* decided March 27, 1944 (slip sheet, p. 1).

It is important that this Court review a decision refusing to give effect to these accepted principles and thereby opening up a method of escape from the Fair Labor Standards Act. The statutory objective of protecting an industry against the competition of employers operating under substandard labor conditions (Section 2; *United States* v. *Darby,* 312 U. S. 100) cannot be achieved if an employer can avoid compliance with the statutory minima by designating his employees as "partners."

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nership device to evade workmen's compensation law); *People* v. *Curiale,* 171 Misc. 264, 12 N. Y. S. (2d) 464 (1939) (partnership arrangement to avoid State minimum wage law).

[17] *Fleming* v. *Palmer,* 123 F. (2d) 749 (C. C. A. 1), certiorari denied, 316 U. S. 662. *Walling* v. *American Needlecrafts, Inc.,* 139 F. (2d) 60 (C. C. A. 6); *Southern Railway Co.* v. *Black,* 127 F. (2d) 280 (C. C. A. 4); *Cole* v. *Harker & Crouch* (W. D. Penn., No. 34, October 10, 1939, unreported).

(b) Even if the workers be regarded as partners for purposes of the law of partnership—as we think they clearly cannot be[18]—they would be employees for purposes of the Fair Labor Standard Act. The Act applies to employers and employees, but it contains its own definitions of those terms. Section 3 (g) defines "employ" as including "to suffer or permit to work." Section 3 (d) provides that "employer" shall include "any person acting directly or indirectly in the interest of an employer in relation to an employee." These definitions plainly encompass this case. Section 3 (g) in particular was referred to by a legislative sponsor of the Act as the "broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657). The object of the broad definition was obviously to bring within the Act all workers who are controlled by and perform work for the benefit of another, irrespective of whether they would come within a strict common law definition of the master-servant relationship. *Walling* v. *American Needlecrafts, Inc.*, 139 F. (2) 60, 63–64 (C. C. A. 6); *Glenn* v. *Beard*, decided March 20, 1944 (C. C. A. 6).[19] The nar-

[18] See p. 16, *supra*.

[19] In the latter case, which is unreported, the court stated:

> In the *Needlecrafts* case, however, the controlling factor was the broad statutory definition of employ. "'Employ' includes to suffer or permit to work." Title 29 U. S. C. A. sec. 203 (g). * * * The fact that such workers may be independent contractors does not, of itself, exclude them from the application of the Fair Standards Act; they are embraced in the classification of employees, within the intendment of that statute, if they are suffered or permitted to work.

row concept of employment embodied in the decision below is inconsistent with the interpretation given the Act by the Sixth Circuit in the above cases. It is important for this Court to determine which of these interpretations shall prevail.

3. The decision below is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Fleming* v. *Palmer,* 123 F. (2d) 749, certiorari denied, 316 U. S. 662. The *Palmer* case involved a scheme to evade the Fair Labor Standards Act strikingly similar to the scheme adopted in this case. Palmer had been engaged in the manufacture of handkerchiefs, employing many homeworkers in his business. After the enactment of the Act and before its effective date, in order to avoid the necessity of complying with it, he induced his employees to form an incorporated cooperative. There were a board of directors and various committees, on which the workers were eligible to serve, but Palmer effectively retained control of the business by securing for himself, his wife, and his brother-in-law positions of importance in the cooperative. This control was implemented, as here, by leases and loan agreements whereby Palmer financed the cooperative and provided the buildings and equipment; this placed him in the position of a controlling creditor with power to administer the enterprise until the "debt" was repaid (123 F. (2d), at 758). A striking parallel exists between Palmer's position and Tomlinson's, and between Palmer's board of directors and the

senior partners and Board of Control in the instant case. Nor is there any substantial difference between the use of a cooperative and a partnership as a means of transforming employees into self-employers.

The District Court found that Palmer was not the employer, within the meaning of the Act, of the members of the incorporated cooperative. The Circuit Court of Appeals rejected this finding, stating that the issue was whether the business was "controlled by the Palmers or * * * by the workers? If the cooperative is controlled by the Palmers then the simple, economic fact is that the members are working for the Palmers and hence are employees of the Palmers and the cooperative within the meaning of the Act" (123 F. (2d), at 751). The court pointed out that "Congress in passing the Act was dealing with economic realities", and concluded (pp. 761–762):

> * * * Palmer possessed extraordinary powers. Whatever powers he might possibly have lacked were lodged in the group of employees most naturally inclined to be favorable to him. The history of the formation and operation of the cooperative, the articles of incorporation and the by-laws do not reveal an industrial democracy governed by workers.
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> * * * * *
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> * * * Palmer controls the cooperative and these workers. The economic fact is

> that they are working for him. The method of paying the workers does not weaken this conclusion. * * *
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> * * * We have been forced to conclude that the district judge's finding that the workers and not the Palmers controlled the business and this cooperative is against the clear weight of the testimony and must be set aside.

The Circuit Court of Appeals thus held that not the formal legal relationship but substantial economic control determined the existence of the employer-employee relationship under the Fair Labor Standards Act.

Although there are differences between the details of the arrangements in the *Palmer* case and this one, the net results of the two plans was the same. In each case—after all the documents had been signed—the original employer, in one capacity or another, retained control of the enterprise and the conditions of the workers remained unchanged.

The decision below is also in conflict with the decision of the Indiana Appellate Court in *In re Zeits,* 108 Ind. App. 617, 31 N. E. (2) 209 (1941), which dealt with the applicability of the Indiana Unemployment Compensation Act to respondent's plan. The *Zeits* case, decided before Tomlinson resumed control of the enterprise as "trustee," held that the Plymouth Manu-

facturing Company was a partnership composed of the senior partners, and subsequently of the Board of Control, and that it was an employer subject to the Indiana statute. In reaching the decision the court carefully examined the requirements of the law of partnership (108 Ind. App., at 635–640), and concluded that the workers were not partners.

4. Where the "ultimate conclusion involve[s] questions of law inseparable from the particular facts to which they are applied" the rule that this Court will not review the concurrent findings of fact of two lower courts does not prevail. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 404. In this case there are no disputed facts, and the "findings of fact" of the district court in the main constitute only statements of its ultimate conclusions (R. 406–409). In the circumstances, these reflect legal rather than factual determinations, and this Court is in as good a position to decide them as were the courts below.

Furthermore, the two-court rule does not apply in case of "clear error," [20] or where the factual

[20] *E. g. Baker* v. *Schofield*, 243 U. S. 114, 118; *Pick Mfg. Co.* v. *General Motors Corp.*, 299 U. S. 3, 4; *Texas & N. O. R. Co.* v. *Brotherhood of Ry. Clerks*, 281 U. S. 548, 558; *District of Columbia* v. *Pace*, decided January 10, 1944. See in particular *Beyer* v. *LeFevre*, 186 U. S. 114; *Darlington* v. *Turner*, 202 U. S. 195; *Schneiderman* v. *United States*, 320 U. S. 118.

decision of itself has important effects,[21] or where there are conflicting rulings in the circuit courts of appeals on similar statements of fact.[22] This case, we submit, falls in all three of these categories. In *Fleming* v. *Palmer, supra,* the First Circuit set aside findings of the district court of the same sort as those involved here as "clearly erroneous." The failure to set aside the findings below will lead to the multiplication of attempts to evade the Fair Labor Standards Act by such devices. The sanctioning of such schemes in the Seventh Circuit alone would in itself engender the unfair competition which the Act was designed to prevent.

CONCLUSION

It is respectfully submitted that this petition for certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MAGGS,
Solicitor, Department of Labor.

APRIL 1944.

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[21] Compare *Schneiderman* v. *United States*, 320 U. S. 118; *Tennessee Coal, Iron & R. Co.* v. *Muscoda Local No. 123*, decided March 27, 1944; *United States* v. *Appalachian Power Co.*, 311 U. S. 377; *Anderson* v. *Abbott*, decided March 6, 1944.

[22] *E. g. Thomson Co.* v. *Ford Motor Co.*, 265 U. S. 445, 447; *Concrete Appliances Co.* v. *Gomery*, 269 U. S. 177, 180.

U. S. GOVERNMENT PRINTING OFFICE: 1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 839

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

vs.

PLYMOUTH MANUFACTURING CORPORATION, ET AL.,
Respondents.

RESPONSE OF RESPONDENTS HUBERT TANNER, WILLIAM H. WOLFARTH, GEORGE E. WARREN, AND CHESTER H. THOMPSON, INDIVIDUALLY AND FOR THEMSELVES AND AS REPRESENTATIVES OF ALL PERSONS CONSTITUTING THE COPARTNERSHIP DOING BUSINESS UNDER THE NAME AND STYLE OF PLYMOUTH MANUFACTURING COMPANY.

ALBERT B. CHIPMAN,
WALTER R. ARNOLD,
Attorneys for Respondents.

Dated April 15, 1944.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

CASES CITED.

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Statement of the Facts.

The petitioner has so studiously edited the facts by interlarding the same with his conclusions and inferences, (drawn to accord with his *contentions* below, and which were rejected by the District Court and the Circuit Court of Appeals) that it is probably appropriate that a recast of the facts, as borne out by the record, be presented untarnished by "subjective considerations" so obviously im-

pinging on the petitioner's "statement"; and these respondents, therefore, present herewith, a composite of the uncontroverted *factual picture* as it existed when the District Court had the case before it, to-wit:

The Corporation.

1. Plymouth Manufacturing Corporation was then the owner of real property and mechanical equipment in Plymouth, Indiana, which constituted a manufacturing plant suitable for the production of wooden packing receptacles used principally in interstate commerce. (Tr. 271.) It had conducted business along the same line at its plant up to October 22, 1938. (Tr. 280 to 283.) Thenceforward it engaged in only two activities—as lessor of the plant and assisting the sub-lessee firm in a financial way, as lender of credit which the firm had not yet established. (Tr. 28b.) At the time of the trial the corporation was in process of dissolution. (Tr. 205-206 and 281b.)

2. Its resolution to cease operations in October, 1938, was impelled because of its inability to compete with other establishments in the same line of business, especially in view of the Wage and Hour law then on the threshold of effectiveness. (Tr. 274 to 275.) It did not make any profit, but suffered consistent losses, for several years before it discontinued business. (Tr. 272 to 273.)

The Lease of the Plant.

3. A group of the former employees of the corporation, on announcement of the Corporation's purpose to discontinue operations, in the summer and early fall of 1938, engaged in negotiations with the management of the corporation, seeking an arrangement whereby the plant would be let to them for operation by the employees on a co-operative basis. (Tr. 274-Tr. 278.) An agreement was reached to let

the plant to four of the former officers of the corporation (also employees of the corporation) and a sub-letting dated October 10, 1938 (Tr. 81c), from the latter to all those who would band together to engage in the co-operative enterprise. The lease was subsequently amended, and as amended and (so far as material here) it provided:

(a) Term began October 22, 1938, to continue indefinitely, but terminable on 30 days' notice from either party to the other. (Tr. 84b.)

(b) Rental to be paid

1. Five per centum of gross sales of commodities and merchandise fabricated on the premises. (Tr. 98b.)
2. Payment by lessees of all taxes levied against the lessor, including State and National income and capital stock taxes. (Tr. 97c.)
3. Insurance premiums on casualty coverage. (Tr. 98a.)

(c) Lessor agreed

1. To make funds available by way of loans to lessees or arrangements for credit to them, the corporation to be paid interest on any such loans at the rate of 6 per centum per annum. (Tr. 96b.)
2. On termination of the lease, to purchase, from the lessees, all tangible and intangible personal property on the premises, paying full appraised value therefor to the lessees.
3. To permit subletting of the demise. (Tr. 84c.)

The Articles of Partnership.

4. Twelve days later the original partnership articles were executed (Tr. 85c) and, as modified by subsequent amendments, provided:

(a) The fiscal affairs and general direction of the firm's business should be conducted by a board of control, consisting of six of the partners, to be elected by all of the members of the firm, one member of the

board being elected each last secular day in June to take his place on the following first of July, and one being elected each last secular day in December to take his place on the board the following first day of January. The term of one member of the board terminated on each the first day of July and the first day of January, of each year. (Tr. 86, 87, 93 and 94.)

The Board of Control.

(b) The Board of Control had the following general powers:

1. To direct the work to be done by the several members of the firm.

2. By unanimous vote of the board members present, but not unless acquiesced in by majority vote of the whole membership of the firm or by unanimous vote of the Adjustment Committee, hereinafter referred to, to terminate the partnership as to any member of the firm on account of

> "Any unlawful, unworkmanlike practice or conduct of disloyalty to the firm or non-conformity with any of the provisions of the Articles of Partnership is done or suffered to be carried on by"

such offending co-partner, and to exclude such offender from the premises. (Tr. 86a, 94c, 116c, 117a.)

3. To admit new members to the firm if the Adjustment Committee (hereinafter described) and the Board of Control should unanimously agree thereto, otherwise to be submitted to a secret ballot vote of the entire firm membership. (Tr. 116c and 117a.)

4. To employ and discharge employees as occasion might dictate, and to fix their remuneration. (Tr. 86c.)

5. To make all contracts and agreements appertaining to the firm business. (Tr. 87a.)

6. To determine when and to what extent contributions to the firm assets should be accepted by

the firm and from its membership, and to fix the value thereof, including the value of work contributions so to be made by the firm membership. (Tr. 88.)

7. To be the sole judge of when and in what circumstances there should be a dissolution of the firm, on giving thirty days' notice to each member of the firm indicating the Board's intention to do so. (Tr. 87a.)

8. On dissolution, to liquidate the firm assets and make distribution of the net proceeds among the firm membership in exact pro ration as provided for the distribution of firm profits (see subparagraph 11, *infra*, this section). (Tr. 87.)

9. To have the exclusive power to collect all moneys due the firm; to borrow money on the credit of the firm; and to pledge firm assets as collateral thereto. (Tr. 87b.)

10. To accumulate and control a reserve fund to be built up out of the net profits of the firm (after deduction of the drawing accounts of the members) equal to thirty percentum of such net profits to be used for the payment of the debts of the firm and as a reserve for stringent business periods. (Tr. 114b.)

11. To distribute quarterly among the copartners (in like pro ration as the drawing account of each bore to the aggregate drawing accounts of all) all net firm profits of the firm not covered into the reserve fund mentioned in subparagraph (10) hereof. (Tr. 114b.)

12. To issue, on admission, to each member of the firm a partner's participation certificate disclosing the rate and value of the contributions in labor or property each had made or was to make to the firm. (Tr. 88c-89.)

The Adjustment Committee.

(c) An Adjustment Committee, consisting of five of the co-partners, was provided for, to be elected in the same manner and at the same time provided for the election of members of the Board of Control. Its powers and duties were:

1. To hear and investigate and present to the Board of Control grievances, recommendations, and other communications of individual partners, pertaining to such individual's status in the firm or the general affairs of the partnership. (Tr. 116c.)

2. To exercise delegated power which the Board of Control might vest in it from time to time in relation to the conduct of the firm business. (Tr. 116c.)

3. To agree with the Board of Control to dispense with the entire firm membership vote on admission of applicants to membership in the firm or termination of the partnership relation with respect to any particular partner. (Tr. 117a.)

4. To require special meetings of the partnership to be called by the Board of Control. (Tr. 117b.)

Distribution of Profits.

(d) As to distribution of profits realized by the firm, the procedure set forth was as follows:

1. Account was to be kept of each partner's contribution of money, property or labor to the firm benefit. (None of the members had contributed anything to the firm other than labor up to the time of trial.) The value of each such contribution was fixed by the Board of Control. (Tr. 88a.)

2. Succeeding the lapse of ten days after making such contribution, each member of the firm was permitted to withdraw from the firm, as advance distribution of profits, an amount equal to the

aggregate value of his contributions to the firm. Thus ten days' contribution of services, as to each member of the firm, was at all times to remain undrawn in the partnership account. (Tr. 89a.)

3. Each three months—December 10th, March 10th, June 10th and September 10th—distribution of the net profits to all the partners was to be effected by deducting from the total profits made in the quarter ending at the end of the month previous, the aggregate partnership withdrawals, then thirty per centum of the balance for reserve, and the remaining seventy per centum divided amongst the partners pro rata in like proportion as each their respective drawing accounts in that quarter bore to the aggregate of all the partners' drawing accounts during such quarter. (Tr. 88a and 114b.)

Withdrawal and Dissolution.

(e) On dissolution, after payment of all debts of the firm, the balance of the liquidation proceeds was to be pro rated amongst the firm membership in like manner as were excess profits. (Tr. 87b.)

(f) On withdrawal of any partner from the firm, an accounting was to be made with him by the Board of Control, within thirty days after the end of the quarter in which the member severed his connection with the firm, and payments to him for his share of excess profits on the same basis as with the remaining partners, but such settlement disposed of all his rights in the firm property. This was so whether he withdrew from the firm voluntarily or *ex mero motu* the firm membership or, in lieu thereof, the unanimous agreement of the Board of Control and Adjustment Committee, that the firm be dissolved as to him. (Tr. 91a.)

Assignment of Partner's Interest.

(g) No partner's interest in the firm could be assigned, without the unanimous consent of the membership of the Board of Control (Tr. 94c) and in the event of death or permanent disablement of any partner, settlement would be made by the Board of Control with him or his estate—as the case might be—precisely in the manner it would be effected had the deceased partner withdrawn from the firm at the time of his death, or disability exceeding thirty days. (Tr. 91c.)

Firm Assumed Obligations of Lease.

(h) It was stipulated in the articles of co-partnership that the firm sub-leased from the original lessee the premises leased by the latter from the corporation, and as consideration therefor, the firm assumed and undertook to pay and discharge all of the original Lessees' obligations under the lease with the corporation and was to become vested with all of the rights and privileges of the lessees under the lease. (Tr. 85c and 100a.)

All Workers Firm Members.

5. With five or six exceptions (persons who became employees of the new firm), each person working in the plant and in any manner rendering personal service in the business of the firm, had subscribed these articles of co-partnership either before or shortly after he or she commenced rendering such service. (Tr. 204b.) This was true from the 24th day of October, 1938, to the date of the hearing. (Tr. 212c.) There was no contention that any person, who was indisputably an "employee"—the five or six exceptions aforesaid—had at any time been employed by any of the defendants in violation of the Fair Labor Standards Act. Every member of the firm (worker) had an interest in the firm profits and no person, firm or corporation, not a mem-

ber of the firm, had any direct interest in the firm profit or losses. (Tr. 205a and Tr. 301-304.)

No Fraud or Legal Duress.

6. No fraud or duress was practiced upon any worker to induce or compel him to engage in the articles of co-partnership. (Tr. 128-129.) Each knew that by subscribing the articles he was becoming a member of a partnership and, as such, would be liable for all of the debts of the firm. (Tr. 236, 237.) All were given to understand that it would be the policy of the firm to confine the man-power needed in the plant to be expended by partners only, and that failing to become members of the firm, meant, in almost every instance, cessation of earnings at the plant. (Tr. 267.) There was never any discharge of employees by the corporation. It merely ceased to function as employer of anyone (excepting four or five officials) on and after October 22, 1938. (Tr. 280 and 281.) Up to the time of dissolution proceedings it did, of course, have an indirect interest in prosperity of the partnership—the latter owed it for rent, advances made and materials purchased from it to upwards of $40,000.00. (Tr. 122c.) It was vitally interested to see that the partnership (and, in consequence, the individual partners) made profits out of which the firm could pay the corporation the rent and the debt owing by the firm to it. Other than that indirect interest, the corporation had no concern with gain or loss, profit or income resulting from the operations of the firm.

Tomlinson's Connection With the Firm Affairs.

7. On December 11, 1939, the firm arranged for a line of credit up to $75,000.00 with State Exchange Bank of Culver, Indiana. An indemnifying mortgage was given the bank to secure it against loss in extending such credit. In

this instrument appellee Sam Tomlinson was designated trustee. It was provided that Tomlinson should apply any proceeds of liquidating any collateral thereby given to the payment of any past due indebtedness of the firm. (Tr. 100-104.) The following events transpired with respect to this mortgage and debt it secured:

(a) On July 15, 1941, the firm was owing unto Culver State Bank $27,000.00 on past due promissory notes. It owed the Corporation $38,160.00 on notes and open accounts. (Tr. 106a.)

(b) Litigation was pending involving the firm in relation to unemployment insurance contributions and social security taxes, and distraint was threatened against the assets of the firm. (Tr. 107.)

(c) The firm and the mortgagees agreed that the latter, through Tomlinson as trustee (who should become general manager of the firm's business, employed by it at $25.00 per week) would take possession of the firm assets and hold them in trust for the benefit of the firm and the mortgagees until the debts secured by the mortgage were fully discharged. (Tr. 108 and 109.)

(d) The internal government of the affairs of the firm, as provided by the articles of co-partnership, and the authority of the board of control, was not to be altered, abridged, or impaired, excepting the trustee was given power to manage the finances of the firm, and supervise its outlays during continuance of the conservatorship. (Tr. 109.)

(e) In event it developed that the drawing accounts fixed by the Board of Control should be in excess of the amount of funds available from profits to make disbursement thereof to the partners, the trustee had the power to reduce them pro rata, the balance in favor of any partner to stand as a first charge against future profits of the firm. (Tr. 109.)

(f) The trustee was given power to designate (with the consent of the Board of Control) a deputy or successor trustee in event he was unable to perform all or any part of his duties as such trustee. (Tr. 110c.)

(g) All funds of the firm were turned over to the

trustee who should make disbursement thereof for the benefit of the firm and the mortgagees as provided by the agreement. (Tr. 110c-Tr. 111a.)

(h) This managership contract was in effect at the time of the hearing. (Tr. 207.)

Relationship of Respondents Warren, Thompson, Tanner, and Wolfarth to Firm.

Respondents Warren, Thompson, Tanner and Wolfarth were, prior to October 22, 1938, nominal shareholders in, officers of and employed by the corporation. When the arrangement was formulated between the employees of the corporation to lease the plant from the latter these four in effect "underwrote" the arrangements so far as concerned the employees' status in the transaction. (Tr. 133 and 134.) They, the four of them, entered into the lease with the corporation and handled most of the negotiations with counsel and the other employees to get the firm structure to functioning. (Tr. 272-278.) They acted as the original nucleus of the co-partnership, and were therein designated "senior partners." (Tr. 285.) Until an amendment to the articles of co-partnership (formally consummated about one year after its practice began in actuality) they constituted the Board of Control. (Tr. 86-88.) Never did they conduct or have anything to do with any business as individuals or co-partners pertaining to any matter involved in this case, but only as co-partners with the other workers at the plant. (Tr. 284b.)

Reasons for Denying the Writ.

It is not believed by the respondents that upon the facts before the District Court a decision in favor of the petitioner could have been sustained. The basis for such a decision would have been untenable, in that an injunction would necessarily have rested upon inferences drawn

from historical facts that had been completely superseded by events when the proceeding was begun. Unbiased consideration of these events and their contractual products as hereinabove set forth leaves little doubt that the "workers" in the Plymouth Manufacturing Company plant were —in the eyes of the law and in the conscience of equity— indisputably co-partners, because:

(a) They, and only they, had complete control, through their appointed agency (The Board of Control) of all of the activities of the enterprise, subject only to the restraining hand of their creditors (in accordance with a debtor-creditor contract executed by them) against improvident expenditure of money or assumption of obligations.

(b) They, and only they, as a co-partnership, had the right to determine the composition of the firm.

(c) They, and only they, as individual members of the firm, received the net profits of the firm.

(d) They, and only they, were liable for all of the firm debts.

There not being absent one solitary ingredient essential to the character of a pure co-partnership, to hold that the members constituting the firm were nevertheless "employees", immediately evokes the question: "Of whom were they employees?" The quintessence of petitioner's position on this question is that if any of the respondents

"suffered or permitted the workers to work on the premises"

that is, on property controlled by the firm and known as The Plymouth Manufacturing Company plant—they, *ipso facto,* constituted themselves the "employers" of the permittees under the provisions of the act. Carried *ad absurdum* every owner of a vacant lot in the city of Alexandria who permits its use by "Victory gardeners" would (save for the exception of agricultural labor from the act's provisions) be "employers" of those who scratch its surface to replenish their larders across the Potomac.

Every landlord who lets his building to a firm of auto mechanics, where the co-partners' labor resultant is to enter interstate commerce—*e. g.*, labor applied to an interstate carrier's motor trucks—is the "employer" of the co-partners, within the meaning of the act, if the landlord knows beforehand of the nature of their work and the personnel which is to perform it. Indeed, the argument, on the same principle, might be carried to the extreme of making every property owner, who admits to his premises a contractor who employs labor on the premises to fabricate goods for interstate commerce, the employer of the contractor's employees within the meaning of the act!

If the petitioner admits that this is not plausible, then he must admit with equal candor that something besides mere "permission or suffering to labor" is necessary before it is essential to spell out the "employer-employee" relationship under the act. The Congress has supplied this needful nexus:

> "Employee" includes any individual employed by an "employer." (Subdivision (e) of Section 3.)

In short, there must not only be an "employment" and an "employer", but also an "employee." There is no definition of "employer," other than broadening it by including within its ordinary meaning

> "any person acting directly or indirectly in the interest of an employer in relation to an employee."

Obviously, that leaves the status covered by the term "employer" as it was before the act was enacted, excepting stretching its reach to a vice-principal of the employer. Thus educes the 5th Circuit such import from the definitions given in the act. (*Bowman* v. *Pace Co.*, 119 Fed. (2nd) 858):

> "It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor

> suffered or permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the Act. * * * The conclusion that Bowman is not the employee of the Pace Company is supported by the decisions under the Federal Employers' Liability Act, g. 1, 45 U. S. C. A. g. 51. It was held that the word should be taken in its natural sense, and did not include among the railroad's employees the porters on Pullman cars who were hired by the Pullman Company, though they served the Railroad's passengers, and sometimes took up the tickets of late passengers. *Robinson* v. *Baltimore & Ohio R. R.*, 237 U. S. 84, 35 S. Ct. 491, 59 L. Ed. 849. And a similar view was taken about express company employees working on trains under an arrangement with the railroad. *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, 41 S. Ct. 93, 65 L. Ed. 205. And one was not an employee of the railroad company who contracted to handle by himself and by his employees the coal for the company's engines and to remove and dispose of cinders, though he was engaged in commerce and got instructions about the performance of the work from the yard-master; it was held there was not even a jury issue about it. *Chicago, Rock Island & Pac. R. R.* v. *Bond*, 240 U. S. 449, 36 S. Ct. 403, 60 L. Ed. 735."

The idea evolving from petitioner's contentions in this respect, pressed to its ultimate terminus, would result in the solecistic conclusion that the "workers" are employees of the unlimited co-partnership of which they are the sole members! The difficulty that the petitioner experiences in answering the question, "Who is the employer?" is exemplified from the following quotation from page 15 of his petition,

> "During the period that Tomlinson or the corporation, or either of them, was the employer, Tanner, Wolfarth, Warren, and Thompson were clearly persons 'acting directly or indirectly in the interest of an employer in relation to an employee', within the meaning of the definition of employer in Section

> 3 (d) of the Fair Labor Standards Act. If, for any portion of the time in question, Tomlinson or the corporation were not employers, Tanner, Wolfarth, Warren and Thompson, acting together as co-partners or otherwise, were. If Tomlinson as trustee was not the employer himself, he was acting in the interest of the employer, whether it be the corporation, Tanner, Wolfarth, Warren, and Thompson as 'senior partners' or as dominating members of the Board of Control."

Unquestionably, if petitioner's suggestion is given concrete application, every co-partner in the country (engaged in production of goods turning into or destined for the stream of interstate commerce) is an "employer" of such of the co-partners as are active in production and not specifically excluded (executive and administrative personnel) by the terms of the Act. From thence it is but a few millimetres to the extreme absurdity that every *individual* producer for interstate commerce is his own employer! For does not the connotation urged by petitioner cover precisely that situation? It being, as respondents believe, demonstrable that a decision, contrary to that pronounced by the District Court, could not have been sustained on the strength of the interferences that petitioner here would insist were educible from the evidence, how much more foreign to petitioner's purpose it must be when the District Court has drawn contrary inferences and the Circuit Court of Appeals has declared

> "The court's finding to this effect was not clearly erroneous but instead was clearly correct"?

Petitioner suggests that the District Court and the Circuit Court of Appeals had ignored the holding of the Appellate Court of Indiana, *in re Zeits*, 108 Ind. App. 617. This was an *ex parte* opinion on a certified question of law. The Plymouth Manufacturing Company—the partnership—was granted leave to file briefs and did so. Un-

fortunately, the Unemployment Compensation Review Board had couched its questions in such biased language as to "actual conduct in respect of the contract" that the firm's brief, (which could not, under the license accorded the firm, carry additional facts—aside from contracts—into the record for consideration by the Appellate Court) could accomplish little to produce an opinion at odds which the Board indicated it desired. Of course, opinions rendered by the Appellate Court in response to certified questions of law by administrative or executive bodies, are not in any manner binding on the persons whose interests are involved in the questions, and they are not binding precedents.

Estate ex rel. v. *McMahan*, 194 Ind. 151.
Venable v. *Fairmont Glass Works*, 83 Ind. App. 77.
Evans v. *Watt*, 90 Ind. App. 37.
Bimel Spoke Co. v. *Loper*, 65 Ind. App. 479.

So also held the Marshall Circuit Court decision. (Tr. 402b.)

Aside from these considerations, and what to us appears as the construction of a paradox by petitioner, the Appellate Court did not hold that the corporation or Tomlinson or the four lessees, in any manner sustained the relationship of master or employer toward the workers, but held that the workers were the *employees of whichever of their number might, for the time being, constitute the Board of Control of the firm*—whosoever the workers might elect. In other words, under the Appellate Court decision Tanner, who then was but who no longer is a member of the Board of Control, is now an *employee* of the other members, though before the election which supplanted him, he was, by the terms of the opinion, one of the *employers* of the very person who took his place on the Board. Russell Travis, who was never an officer of the corporation or lessee (excepting as every other worker

became such) was held to be an "employer" from November 7, 1939, to January 1, 1941, (Tr. 44, and see p. 640 of 108 Ind. App.), and on the latter date became and has continuously since been an *employee* of his present *employers*, who before that date were his "*employees.*" The utter absurdity of the holding is reflected in the brief of the petitioner who carefully refrains from alluding to the ultimate answers given by the Appellate Court to the questions, as contained in the report of the case, and which, so far as the Court and Board were concerned, constituted the vitals of the determination. Ironically too, is petitioner's contention that the Courts below had before them a rule of decision from Indiana to which they must yield their own judgment, if the latter conflicts, and yet, the petitioner urged a holding far at variance with that "decision." At no point did petitioner undertake to have the Courts hold that the members of the Board of Control, in the various stages of the history of the firm, are the "employers" as so held in the answers given by the Appellate Court. On the contrary, petitioner insisted that the Board of Control was a mere pawn or instrumentality of the corporation and individual respondents.

What apparently is sought by petitioner is a review of facts—a new set of inferences (however untenable) to be drawn therefrom, and a reversal of the trial court and of the Circuit Court of Appeals, not on pure questions of law, but by the substitution of deductive assumptions to support the petitioner's contentions for the present judicially and judiciously drawn inferences supported by the evidence in the record. This Court has heretofore assiduously avoided any substitution of its own conclusions of fact for the ultimate facts found by the courts *nisi*, where the latter rested on substantial evidence. This has been true even where a different conclusion on facts then found

by the triers thereof was well warranted by the evidence. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 68 L. ed. 413, 44 S. Ct., 164. This was the rule before adoption of the present Rules of Practice and Procedure. *General Talking Pictures Corporation* v. *Western Electric Co.*, 304 U. S. 175, 82 L. ed. 1273. And now, that all Circuit Courts of Appeal are specifically admonished by Rule that

> "Findings of fact shall not be set aside unless clearly erroneous." (Rule 52 (a) Rules of Civil Procedure.)

unjust, indeed, it is to propose that this Court should do, on certiorari to a Circuit Court of Appeals, what this Court has forbidden the Circuit Court of Appeals doing in a review of the same case!

It is respectfully submitted that the petition for the writ should be denied.

ALBERT B. CHIPMAN,
WALTER R. ARNOLD,
Attorneys for Respondents.

Dated April 15, 1944.

Explanatory Note.

It being the duty of counsel to bring to the attention of this Court any matter which might affect the Court's jurisdiction in the case, where it is matter *de hors* the record, it behooves the undersigned, as heretofore representing Plymouth Manufacturing Corporation and its counsel of record, to advise that since the case was disposed of below, his client, Plymouth Manufacturing Corporation, has ceased its existence. As shown by the record and opinion of the Circuit Court of Appeals (Tr. 205, 206, 281 and 431) the corporation was in process of dissolution at the time of trial. It completed dissolution proceedings pending the appeal. After dissolution its property was disposed of to five or six other persons, including the fee simple title to the plant, who now hold the same as tenants in common. The undersigned has not been employed by these individual owners, and is not, therefore, authorized to ask their substitution. No desire on the part of any of the other respondents exists to press this to the court's notice as grounds for refusing to consider the petition, but the undersigned deems it to be his duty to state that, *causa mortis*, he has not longer a client in this case.

ALBERT B. CHIPMAN,
Formerly attorney for Plymouth Manufacturing Corporation.

(19)

No. 839

In the Supreme Court of the United States

OCTOBER TERM, 1943

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

PLYMOUTH MANUFACTURING CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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The "Explanatory Note" at the end of the respondents' brief in opposition brings to the Court's attention the fact that since the decision below the Plymouth Manufacturing Corporation was dissolved, and its property disposed of "to five or six other persons * * * who now hold the same as tenants in common." As appears from the affidavit of Albert A. Ewbank, attached hereto, the real and personal property of the corporation is shown to have been transferred to Sam Tomlinson and his wife and six children.

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Tomlinson had owned or controlled substantially all the shares of stock of the corporation.

Tomlinson personally was a defendant below and is a respondent here. Irrespective of whether the dissolution abates the case as against the Plymouth Manufacturing Corporation, it does not affect the proceeding in so far as it involves Tomlinson and the other respondents.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APRIL 1944.

STATE OF INDIANA,
County of Marion, ss.:

AFFIDAVIT OF ALBERT W. EWBANK

Comes now Albert W. Ewbank and being duly sworn upon his oath, says that he is an attorney employed by the United States Department of Labor, Office of Solicitor, and that he is assigned to duty within the Ninth Region of the Wage and Hour and Public Contracts Divisions, which Region comprises the States of Illinois, Wisconsin, and Indiana, and that his official duty station is located in Indianapolis, Indiana, and that in the course of his duties as attorney, he has charge of the conduct of legal matters pertaining to the enforcement and administration of the Fair Labor Standards Act of 1938 and the Public Contracts Act of 1936. That this affiant is now and has been for more than ten years last past a member of the Bar of the State of Indiana and as such is generally familiar with the official records maintained and kept in the various State and County offices.

This affiant further states that he has examined the Articles of Dissolution filed in the office of the Secretary of State, State House, Indianapolis, Indiana, and in the Office of the County Recorder, Marshall County, Indiana, in the matter of the PLYMOUTH MANUFACTURING CORPORATION. That

the Articles of Dissolution so filed in the Office of the Secretary of State were approved by Rue J. Alexander, the duly elected and acting Secretary of State of the State of Indiana on March 18, 1943. A copy of said Articles of Dissolution filed and approved by the Secretary of State were duly filed and entered in the records now in the possession and control of the Recorder of Marshall County, Indiana on April 2, 1943 and that said Recorder is the proper custodian of such records. Said Articles of Dissolution as filed in the Office of said Secretary of State and said Recorder of Marshall County show within their body that with the authority and at the direction of the owner of all shares of the preferred and common stock of the PLYMOUTH MANUFACTURING CORPORATION, all of the assets as payment in full of all debts and liabilities of the corporation of every kind and character, were distributed and transferred in kind as of December 31, 1941 according to an agreement reached during the month of December 1941 to the following named parties, to wit: Sam Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, Carrie Tomlinson, and Lydia Olga Rullman. That said assets according to said Articles of Dissolution consist of the following described property: real estate and lease, machinery and equipment, and office furniture and fixtures.

That this affiant has diligently and carefully examined the records in the office of the Recorder of Marshall County located in the Court House in Plymouth, Indiana, the proper custodian of all deeds, mortgages, and miscellaneous records pertaining to real estate transactions within said Marshall County, State of Indiana, and that such examination by this affiant discloses the recordation of a warranty deed executed by the PLYMOUTH MANUFACTURING CORPORATION by its officers, Sam Tomlinson, president, and Hubert Tanner, its secretary, under date of July 1, 1942, which warranty deed purports to convey to the following named persons the real estate owned in fee simple by the said PLYMOUTH MANUFACTURING CORPORATION, to wit: Sam Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, Carrie Tomlinson, and Lydia Olga Rullman, in Marshall County in the State of Indiana. That said grantees in the deed are the one and the same persons enumerated in the Articles of Dissolution hereinbefore referred to. That a duly certified copy of said warranty deed is herewith attached and made a part of this affidavit and for identification is referred to as "Exhibit A." That said deed appears of record in deed record 120 at page 137–138 in the records made and kept by said Recorder.

That this affiant is informed and believes that Sam Tomlinson and Carrie Tomlinson, named as

grantees in said deed, are husband and wife and reside at 310 North Walnut Street in the town of Plymouth, Marshall County, Indiana; that said Sam Tomlinson is the one and same person who signed said warranty deed for and in behalf of the corporation as its president. That Helen Tanner named as a grantee in said deed, daughter of said Sam Tomlinson and Carrie Tomlinson and is the wife of Hubert Tanner, who signed said warranty deed for and in behalf of said corporation as its secretary; that said Helen Tanner resides on West Garro Street in the town of Plymouth, Marshall County, Indiana. That Bertis M. Jacox, named as a grantee in said warranty deed is the daughter of Sam Tomlinson and Carrie Tomlinson and this affiant is informed and believes that said Bertis M. Jacox is the wife of Paul Jacox and that said Bertis M. Jacox is a resident of the State of Florida. That this affiant is further informed and believes that Paul A. Tomlinson, named as a grantee, is the son of Sam Tomlinson and Carrie Tomlinson and that as this affiant is further informed and believes, such grantee, Paul A. Tomlinson, was lately a resident of the city of Mishawaka, County of St. Joseph, Indiana. That this affiant is further informed and believes that Doris J. Wass, named as a grantee in said warranty deed, is a daughter of said Sam and Carrie Tomlinson, and that she is the wife of one Donald Wass and is now a resi-

dent of the State of Missouri. This affiant is further informed and believes that Florence Joyner is a daughter of Sam and Carrie Tomlinson and is a resident of the State of Ohio and is now residing in or near the city of Akron within said State. This affiant is further informed and believes that Lydia Olga Rullman is a daughter of Sam and Carrie Tomlinson and is the wife of Martin L. Rullman named in the Articles of Dissolution as a director of said PLYMOUTH MANUFACTURING CORPORATION, and resides at 307 East Garro Street, within the town of Plymouth, Marshall County, State of Indiana. This affiant is informed and believes that the aforenamed Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner and Lydia Olga Rullman named as grantees in said warranty deed are all of the children of Sam Tomlinson, the president of the PLYMOUTH MANUFACTURING CORPORATION, now dissolved, who is the one and the same person as Sam Tomlinson named as a grantee in said warranty deed filed and recorded in the office of the Recorder of Marshall County in the Court House in the town of Plymouth within said county. That the information and belief of this affiant is based upon information obtained by affiant from Margaret Jacoby, a deputy in the Office of the Recorder of Marshall County who has for many years known Sam Tomlinson, Carrie Tomlinson, and the chil-

dren of said Sam Tomlinson, and from information obtained from George F. Stevens, a practicing attorney in the town of Plymouth, Indiana, who has been a resident of Plymouth for many years, and who is well acquainted with Sam Tomlinson and the members of his immediate family.

That this affiant has diligently searched the records in the Office of the Recorder of Marshall County, Indiana, and finds no record of a lease purported to have been executed by the PLYMOUTH MANUFACTURING CORPORATION to the PLYMOUTH MANUFACTURING COMPANY in 1938 for the real estate described in the warranty deed which is herewith attached to Exhibit "A." That the affiant is unable after diligent search to find any record in the office of the Recorder of Marshall County of any assignment or other disposition of any assets designated as a leasehold interest for the real estate described in said warranty deed herewith attached as Exhibit "A," and which lease is enumerated among the assets transferred and distributed to the said Sam Tomlinson, Carrie Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, and Lydia Olga Rullman, in accordance to their respective interests as set forth in the Articles of Dissolution of the PLYMOUTH MANUFACTURING CORPORATION.

That this affiant has examined the transfer books in the Office of the Auditor of Marshall

County and said transfer book shows a transfer of the real estate described as follows: N–6 a of S., 16 a of N. ½ of S. W. ¼, ex. RR and ex. Thayer's Add'n. and ex. Artificial Ice Company property, Lot 12, M. R. L. from the PLYMOUTH MANUFACTURING CORPORATION to Sam Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, Carrie Tomlinson, and Lydia Olga Rullman, which is the transaction hereinbefore referred to in the warranty deed duly recorded in the Office of the Recorder, Marshall County. That said transfer is also noted in the 1941 Assessor's Book, Line 994, which is in the Office of the County Assessor of Marshall County, Indiana.

That this affiant has examined the 1943 assessment records of said real estate, which assessment is recorded in the Assessor's Book for 1943 of Plymouth City at Page 191 thereof, Line 1390, which shows that the assessment of said property was made as of March 1, 1943 in the name of Sam Tomlinson, et al. Said assessment shows said valuation of said real estate to be $535, the value of the improvements thereon as $4,200, and the total assessed valuation of the land and improvements as of $4,735. Said 1943 Assessor's Book of Plymouth City shows the personal assessment for personal property of Sam Tomilson, et al. as $2,455 on the factory property hereinbefore described. Said Assessor's Book of 1943 herein-

before referred to is now in the Office of the Auditor of Marshall County, Indiana, the proper custodian of said records.

This affiant states further that he has made a diligent and careful search of the records in the office of the County Assessor of Marshall County and has examined the schedule of personal property filed by Sam Tomlinson and by Sam Tomlinson, et al (co-tenants) and by the PLYMOUTH MANUFACTURING COMPANY as of the first day of March, 1943. The records in said Office of the County Assessor, Schedule No. 3012 of Sam Tomlinson, residing at 310 North Walnut Street, Plymouth, Indiana, and which schedule is subscribed and sworn to by Hubert Tanner, for and on behalf of Sam Tomlinson before Frank E. Head, a deputy in the County Assessor's Office, shows such total personal assessment of Sam Tomlinson as $425. Schedule No. 3013 purporting to be a schedule of the factory property of Sam Tomlinson, et al (a co-tenancy) located at Novelty and Walnut Streets in the town of Plymouth, Indiana, shows a schedule of office equipment in said factory property listed as $55 and factory machinery and equipment as of $2,400, showing the total assessed valuation $2,455 upon said personal property located in the factory building located at Novelty and Walnut Streets, which factory building is situate upon the real estate described in the warranty deed set out herein as Exhibit "A." The

oath attached to said schedule is signed by Sam Tomlinson, et al (co-tenancy) by Hubert Tanner, subscribed and sworn to before Frank E. Head, a Deputy Assessor of Marshall County, Indiana on the 15th day of April, 1943. Such schedules of the personal property above referred to are upon the form schedules prescribed by the State Board of Tax Commissioners of the State of Indiana. The schedule for the PLYMOUTH MANUFACTURING COMPANY, a Partnership, is filed upon a form prescribed by the State Board of Tax Commissioners of the State of Indiana for use by Domestic and Foreign Corporations, Individuals, Partnerships, Firms and Unincorporated Associations having tangible property within the State of Indiana, which schedule was subscribed and sworn to by Chester H. Thompson for the PLYMOUTH MANUFACTURING COMPANY by Frank E. Head, a Deputy Assessor for Marshall County, Indiana on April 13, 1943, and is filed as No. 2499, in the book including the letter "P" in the County Assessor's Office of Marshall County, Indiana. That such partnership schedule shows no real estate or intangible property owned by the PLYMOUTH MANUFACTURING COMPANY. Said schedule shows the declared value of the cash on hand, as $500 and the declared valuation of a Chevrolet town sedan used as delivery equipment by the company as $590, and a declared valuation of the total inventory of all personal property then on hand as $15,000.

Said total declared valuation on said schedule is shown to be $16,090.

That no schedules for assessments as of March 1, 1944 are available in the Office of the Assessor of Marshall County, as such assessments have not been made by Frank E. Head, Deputy Assessor of Marshall County, Indiana.

This affiant is further informed and believes that the shares of stock listed in the Articles of Dissolution as 416 shares of common stock and 120 shares of preferred stock were all held by Sam Tomlinson or by members of his immediate family and that all shares of common and preferred stock outstanding of the PLYMOUTH MANUFACTURING CORPORATION, now dissolved, were vested in, owned by, or controlled by Sam Tomlinson, and that any shares of stock purported to be outstanding in the name of any other individuals, namely, William H. Wolfarth, now deceased, Chester H. Thompson, or Geo. E. Warren, were merely transfers of record on the corporation books, but that such shares of stock were never in fact, as this affiant is informed and believes, owned by or vested in said William H. Wolfarth, now deceased, Geo. E. Warren or Chester H. Thompson. That Hubert Tanner, Secretary of said corporation, listed also as an owner of shares of stock in the said PLYMOUTH MANUFACTURING COMPANY, is the husband of Helen Tanner, the daughter of Sam Tomlinson, and that any such shares owned by, trans-

ferred or assigned to said Hubert Tanner as Secretary of the Corporation were indirectly controlled by said Sam Tomlinson.

And further affiant saith not.

ALBERT W. EWBANK.

Subscribed and sworn to before me this 26th day of April 1944.

EDWIN STEERS, SR.,
Notary Public.

My Commission expires Nov. 10, 1946.

EXHIBIT A

4396 WARRANTY DEED

THIS INDENTURE WITNESSETH, That Plymouth Manufacturing Corp., of Marshall County, in the State of Indiana, Conveys and Warrants to Sam Tomlinson, Carrie Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, and Lydia Olga Rullman of Marshall County, in the State of Indiana, for and in consideration of One and no/100—($1.00)—Dollars, the receipt whereof is hereby acknowledged, the following described Real Estate in Marshall County, in the State of Indiana, to wit:

The North Six (6) acres of the South Eighteen (18) acres of the North Half (N½) of the Southwest fractional Quarter West of the Michigan Road of section Twelve (12) Michigan Road Lands, except the right of way of the Terre Haute and Logansport Railroad Company (known as the Vandalia Road) and except Thayer's North Addition to the City of Plymouth, which addition is laid off and platted on the East 327 feet of said Six (6) acre tract, also except the Artificial Ice Company Lot, being Ninety (90) feet wide at the South end and Eighty (80) feet wide at the North end, off of the entire east side of the following described tract: The North Six (6) acres of the South Eighteen (18) acres of the

North Half (N½) of the Southwest fractional Quarter (SW fr. ¼) of Section Number Twelve (12) Michigan Road Lands, West of the Michigan Road, except the right of way of the Terre Haute and Logansport Railroad (known as the Vandalia Railroad) off of the West end, and except Thayer's North Addition to the City of Plymouth off the east end thereof, platted on the East three hundred twenty-seven (327) feet of the said tract.

IN WITNESS WHEREOF, The said Plymouth Manufacturing Corp., by its President and Secretary, has hereunto set its hand and seal, this 1st day of July 1942.

PLYMOUTH MANUFACTURING CORP. [SEAL]

By SAM TOMLINSON, [SEAL]
President.

HUBERT TANNER, [SEAL]
Secretary.

STATE OF INDIANA,

Marshall County, ss:

Before me, the undersigned, a Notary Public in and for said County and State, this 1st day of July A. D. 1942, personally appeared the within named Plymouth Manufacturing Corp., by its President, Sam Tomlinson, and its Secretary, Hubert Tanner, Grantor in the above conveyance, and acknowledged the same to be its voluntary act and deed, for the uses and purposes herein mentioned.

I have hereunto subscribed my name and affixed my official seal.

[NOTARY PUBLIC SEAL]

ALBERT B. CHIPMAN,
Notary Public.

My Commission expires June 6, 1946.

No Revenue Stamps attached.

Received for record September 18th, 1942, at 3:25 o'clock P. M.

[S] HERBERT A. PETERSON,
Recorder of Marshall County, Indiana.

U. S. GOVERNMENT PRINTING OFFICE: 1944